LIBRARY
SUPREME COURT, U. S.

No. 73-1238

FILED
APR 1 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION, ILA, AFL-CIO, *et al.*, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ELINOR HADLEY STILLMAN
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
A. The Board's findings of fact	2
B. The decisions below	8
Argument	9
Conclusion	15

CITATIONS

Cases:

Compton v. *International Organization of Masters, Mates and Pilots, International Marine Division, ILA-AFL-CIO, et al.*, Civil No. 712-71, 78 LRRM 2598	8
Florida Power & Light Company v. *International Brotherhood of Electrical Workers, Local 641, et al.*, No. 73-556, and *National Labor Relations Board* v. *International Brotherhood of Electrical Workers, AFL-CIO, et al.*, No. 73-795, certiorari granted, January 21, 1974	13, 14
Hanna Mining Co. v. *District 2, Marine Engineers Beneficial Ass'n*, 382 U.S. 181	13
International Hod Carriers, Local 1140 (Gilmore Construction Co.), 127 NLRB 541, enforced, 285 F. 2d 397	10

Cases—Continued Page

International Typographical Union Local 38 v. *National Labor Relations Board*, 278 F. 2d 6, affirmed, 365 U.S. 705 10
Local 423 Laborers' International Union of North America, AFL-CIO (Mansfield Flooring Co.), 195 NLRB 241, enforced, 82 LRRM 2478 10
Portland Stereotypers' and Electrotypers' Union No. 48 (Journal Publishing Co.), 137 NLRB 782 10

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2
Section 2(3) 12
Section 2(5) 12, 13
Section 8(a)(2) 12
Section 8(a)(3) 12
Section 8(b) 12
Section 8(b)(1)(B) 8, 9, 10, 11, 12, 13, 14
Section 10 8
Section 14(a) 9

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1238

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION, ILA, AFL-CIO, *et al.*, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 486 F. 2d 1271 (Pet. App. 3a-17a). The decision and order of the National Labor Relations Board are reported at 197 NLRB No. 69 (Pet. App. 18a-42a).

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1973 (Pet. App. 1a-2a). A petition for rehearing was denied on December 3, 1973 (Pet. App. 2a). The petition for a writ of certiorari was filed on February 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the union restrained and coerced the employer in the selection of its representatives for the purposes of the adjustment of grievances by picketing its ship in order to force it to replace four officers who had grievance adjustment functions with others who were members of the union.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 3.

STATEMENT

A. The Board's Findings of Fact

Until November 1970, when it became bankrupt, South American Caribbean Line ("Caribbean Line") operated the M/V *Floridian*, a container vessel, between Miami, Florida, and San Juan, Puerto Rico (Pet. App. 20a-21a; A. 97-98, 108, 193-194, 202,

211).[1] During the years of Caribbean Line operation, the ship's master and three mates were represented by the petitioner, International Organization of Masters, Mates and Pilots ("Masters, Mates, and Pilots"),[2] the engineering officers by Marine Engineers Beneficial Association, District 2 ("Marine Engineers"), and the unlicensed seamen by Seafarers International Union ("Seafarers International") (Pet. App. 20a; A. 98, 175, 193). When Caribbean Line became bankrupt, the *Floridian* was decommissioned and laid up as part of the reserve merchant fleet in Norfolk, Virginia (Pet. App. 21a; A. 68, 193-194, 202, 211).

In the spring of 1971,[3] while the vessel was still in the reserve merchant fleet, a new company, Marine & Marketing International Corporation (the "employer"), was formed for the purpose of resuming shipping operations between Miami and San Juan (Pet. App. 21a; A. 57, 210). On June 15, Eduardo Garcia, the employer's president, signed a three-year agreement with the Marine Engineers Union covering a unit of the master and mates as well as the engineering officers (Pet. App. 21a-22a; A. 89-90, 102, 205-208). Seafarers International continued to represent the unlicensed seamen (Pet. App. 26a; A. 125, 132-133, 142, 216). Garcia's chief reason for

---

[1] "A." references are to the joint appendix in the court below.

[2] Masters, Mates, and Pilots is conceded by petitioners to be a labor organization within the meaning of the Act (Pet. App. 11, n. 2).

[3] All dates hereafter are in 1971 unless otherwise indicated.

staffing the ship with Marine Engineers Union deck officers, rather than with officers from the Masters, Mates and Pilots Union, was economic (Pet. App. 21a). Marine Engineers and Seafarers International agreed to a crew which was smaller by one engineer and three seamen than that which had been specified by the Masters, Mates, and Pilots Union in its contract with Caribbean Line; this difference saved the employer approximately $100,000 per year (A. 102, 111-112).

Pursuant to the June 15 agreement, Captain Donald Mappin, a Marine Engineers member, was hired as master and authorized to engage, as subordinate officers, mates who had Caribbean containership service; he hired three qualified Marine Engineers members as mates (Pet. App. 22a; A. 94-95). The master and the mates were all hired as supervisors, and all had responsibility for adjusting the grievances of crew members (Pet. App. 26a; A. 93-94, 126, 129-130).[4]

On July 13, Pesil, a Masters, Mates and Pilots representative, boarded the *Floridian*, which was still dry-docked for repairs in Norfolk, and asked Garcia, in Captain Mappin's presence, when he was "going to order the officers for the vessel" (Pet. App. 22a; A. 68-69). Garcia replied that he "had a captain already, that [additional] officers would follow shortly, and that [he] was not ordering any other of-

---

[4] Petitioners concede that "[t]he *Floridian's* master and mates 'adjust grievances among crew members' * * *" (Pet. 9).

ficers" (*ibid.*). Pesil pointed out that Masters, Mates, and Pilots had staffed the ship since her commissioning and was a very competent organization. When Garcia rejoined that he already had a contract with another union to supply the officers, Pesil added that the employer was "making a big mistake" and that, since Masters, Mates and Pilots was now affiliated with "ILA" (International Longshoremen's Association), "there [could] be some serious consequences" (Pet. App. 22a; A. 69, 132).[5]

Ten days later, Pesil called Garcia and again asked when he was going to "order the officers" (Pet. App. 22a; A. 69-70). Garcia asked to see "your head man," and Pesil referred him to Captain Thomas O'Callaghan, president of Masters, Mates and Pilots, whose office is in New York City (*ibid.*). A few days later, Garcia met with O'Callaghan, who stated that his union had "owned" the ship since her commissioning, *i.e.*, had furnished all her deck officers "by tradition" (Pet. App. 22a-23a; A. 70). Garcia, citing his contract with the Marine Engineers, said that he could "not possibly change." O'Callaghan replied that he would rather see the *Floridian* "laid up" than staffed by the Marine Engineers, and warned that his union was "going to stop the ship" (Pet. App. 23a; A. 71).

---

[5] Pesil also interviewed Mappin, demanded to know his union affilation and that of his fellow officers, and declared that the officers "should come from" the Masters, Mates and Pilots Union (A. 132).

The *Floridian* sailed from Norfolk on July 31, in the charge of Mappin and his Marine Engineers subordinate officers. Upon arriving at Miami to embark her cargo, the ship was met at her assigned pier by four Masters, Mates, and Pilots pickets: Captain Bill Travers, who formerly had served as her master, Max Moore and Fred Neuman, former mates, and a fourth individual not identified in the record (Pet. App. 23a; A. 71-73). Neuman was patrolling with a sign reading as follows:

> MV FLORIDIAN UNFAIR TO FRED W. NEUMAN FORMER 3RD MATE MEMBER OF INTERNATIONAL ORG. MASTER MATES & PILOTS, INT. MARINE DIV., I.L.A. AFL-CIO

Other picketing officers carried similar signs (Pet. App. 23a; A. 72-73).

Longshoremen of a Miami ILA local observed the picket line and refused to load the ship. The employer obtained a temporary restraining order from the state court, whereupon the pickets were removed and the ship was loaded by the longshoremen. She sailed the next day for San Juan, arriving on August 3 (Pet. App. 23a; A. 75-77).

The *Floridian* was to be unloaded in San Juan by a stevedoring gang dispatched from the hiring hall of the Union de Trabajadores de Muelles y Ramas Anexas, Local 1740, ILA, AFL-CIO ("Local 1740"), under arrangements made by Colon and Villalon, Inc., the employer's shipping agent and stevedoring contractor (Pet. App. 23a-24a; A. 147). The gang had checked in with the paymaster at the dock and

was prepared to go to work when the same officers who had picketed at Miami appeared alongside the ship with signs in Spanish similar to those carried in Miami (Pet. App. 24a; A. 77-78, 148). The president of Colon and Villalon, Pedro Villalon, complained to Captain Robert J. Lowen, International Secretary-Treasurer of Masters, Mates and Pilots, who appeared to be the leader of the pickets, that they were trespassing on private property. Receiving no adequate response from Lowen, Villalon called the police; the pickets moved through the terminal gateway onto public property and resumed picketing (Pet. App. 24a; A. 149-150).

Villalon was then called to a dockside telephone. The speaker stated that he was calling from the hiring hall of Local 1740 and wished to talk with Jorge Aponte, vice president of the local, who was present at the terminal that morning. Villalon called Aponte to the phone, and thereafter Aponte went to the pier and talked with the longshoremen. The gang left the terminal without unloading any of the *Floridian's* cargo (Pet. App. 24a-25a; A. 151-152, 157-158). Twice thereafter Local 1740 gangs were dispatched at Villalon's request, but refused to cross the picket line.[6] As a consequence, the *Floridian* remained berthed for six weeks until the picketing ceased pursuant to a district court injunction issued under

---

[6] Upon a fourth request, the gangs failed to show up at all (A. 153).

Section 10(j) of the Act, 29 U.S.C. 160(j) (Pet. App. 25a; A. 153, 164.)[7]

B. The Decisions Below

The Board, in agreement with the Trial Examiner, found that Masters, Mates and Pilots had violated Section 8(b)(1)(B) of the Act by picketing the *Floridian* with the object of requiring the employer "to replace the [Marine Engineers] captain and mates with a captain and mates belonging to [Masters, Mates and Pilots]," thereby coercing the employer "to change its selection of individuals whose duties include the adjustments of employee grievances" (Pet. App. 27a, 41a-42a). The Board further found that Local 1740 had "acted in concert with * * * [Masters, Mates and Pilots]" and that thus Local 1740, too, had violated Section 8(b)(1)(B) (Pet. App. 32a-33a).[8] The Board ordered both Masters, Mates, and Pilots and ILA Local 1740 to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. App. 34a-37a).

A divided court of appeals affirmed the Board's findings and conclusions, and enforced its order (Pet. App. 3a-17a). Observing that Masters, Mates, and Pilots' actions "come within the literal purview of

---

[7] *Compton* v. *International Organization of Masters, Mates and Pilots, International Marine Division, ILA-AFL-CIO, et al.*, Civil No. 712-71, 78 LRRM 2598 (D. P.R.).

[8] The petition does not contest the propriety of the Board's subsidiary finding that Local 1740 instructed its longshoremen to observe the San Juan picket line (Pet. 13, n. 3).

the * * * language" of Section 8(b)(1)(B), the Court explained:

> The admitted purpose of the picketing was to pressure the company to break its contract with [Marine Engineers], fire the new [Marine Engineers] master and mates, and rehire the former [Masters, Mates and Pilots] master and mates. The Board was obviously correct in concluding that the master and mates are representatives of the employer for the adjustment of grievances. Therefore, under the statutory language the picketing was intended to coerce the employer in the selection of his grievance adjusting representatives. [Pet. App. 6a.]

The court rejected the contention that the picketing fell outside the purview of Section 8(b)(1)(B) because it was carried out by supervisors trying to regain their lost jobs and that Section 14(a) of the Act (Pet. 3) shows that Congress intended to permit supervisors to resort to self-help to protect their interests (Pet. App. 6a-8a). The court also rejected the contention that Section 8(b)(1)(B) was not intended to reach a situation in which the alleged coercion is unrelated to the performance of grievance adjustment or collective bargaining functions by the representatives in question (Pet. App. 8a-11a).

ARGUMENT

The court of appeals correctly applied Section 8(b)(1)(B) of the Act to the unique facts of this particular case. There is thus no occasion for further review.

1. As the court below held, Masters, Mates and Pilots' actions "come within the literal purview of the * * * language" of Section 8(b)(1)(B) (Pet. App. 6a). That Section makes it an unfair labor practice for a union to restrain or coerce an employer "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The picketing was admittedly aimed at forcing the employer to dismiss four supervisors with grievance adjustment responsibilities and to hire others in their place.[9] Had the union succeeded in its efforts, the employer would have been restrained from continuing to employ the representatives it had selected for those purposes and coerced into hiring others it did not wish to select.[10]

Moreover, upon finding such direct coercion for replacement of Section 8(b)(1)(B) representatives, the court below properly declined to scrutinize the employer's motives for wishing to keep the represen-

---

[9] It is beyond question that the means selected—picketing aimed at shutting down the ship's operations—were coercive. "A threat directed to an employer to shut down a job unless the employer complies with a union demand to remove a supervisor and its 'representative' from the job is the most obvious kind of statutory coercion." *Local 423, Laborers, International Union of North America, AFL-CIO (Mansfield Flooring Co.)*, 195 NLRB 241, enforced, 82 LRRM 2478 (C.A.D.C.). See also *International Hod Carriers, Local 1140 (Gilmore Construction Co.)*, 127 NLRB 541, 545, n. 6, enforced, 285 F. 2d 397 (C.A. 8).

[10] Cf. *International Typographical Union Local 38* v. *National Labor Relations Board*, 278 F. 2d 6, 11-13 (C.A. 1), affirmed by an equally divided Court, 365 U.S. 705, 707; *Portland Stereotypers' and Electrotypers' Union No. 48 (Journal Publishing Co.)*, 137 NLRB 782, 787.

tatives he had chosen or the reasons actuating the union's objection to the employer's representatives. For, even if "[g]rievance adjustment was not a factor which entered into the employer's action or [Masters, Mates and Pilots'] reaction" (Pet. 18), to eliminate the picketing would have required the employer to change his representatives for adjusting grievances no less than if the picketing had been directed at the manner in which the Marine Engineers master and mates had performed that function. The legislative history petitioners cite (Pet. 27-28) does not establish that Congress intended to confine Section 8(b)(1)(B) to a situation where the union "dislikes the way in which [a supervisor] may represent the employer in collective bargaining or grievance adjustment" (Pet. 28).[11]

2. To interpret Section 8(b)(1)(B) of the Act as proscribing the picketing here does not "break faith with the scheme that Congress fashioned in 1947 in treating with supervisors"—*i.e.*, withdrawing "statutory protection from them," but not "divest[ing] them of self-protection" (Pet. 33). While Congress

[11] On the contrary, the remarks of Senator Ellender petitioners quote (Pet. 28) indicate that Section 8(b)(1)(B) was intended to curb the practice whereby unions "have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the union" (Pet. 28). A "personnel director or foreman, or other supervisory official" *(ibid.)* could be "too strict" not only when he was performing his collective bargaining or grievance adjustment functions, but also when he was performing his other supervisory or management functions.

may have intended to allow supervisors to resort to self-help to protect their interests, there is no indication that it intended to free them of the restrictions of Section 8(b) when they sought to do so through a labor organization which consists of statutory employees as well as supervisors (a "statutory labor organization").[12] A statutory labor organization, unlike one composed solely of supervisors, enjoys the protection of the Act[13] and it is also subject to its proscriptions.[14] In the present case, the supervisors

---

[12] As the court below noted (Pet. App. 6a-7a):

> Section 8(b), by its terms, applies only to "a labor organization or its agents * * *." A union composed solely of supervisors is not a "labor organization" as that term is defined in the Act. See 29 U.S.C. 152(5) (1970). It has no statutory "employees." See 29 U.S.C. 152(3). Such a union, therefore, cannot commit an unfair labor practice under any of the subsections of Section 8(b), including Section 8(b)(1)(B).

[13] For example, the protection afforded by Section 8(a)(2), 29 U.S.C. 158(a)(2), and Section 8(a)(3), 29 U.S.C. 158(a)(3) (see Pet. App. 8a).

[14] To subject supervisors to the proscriptions of the Act when they join a labor organization which includes statutory employees, but not when they join one composed exclusively of supervisors, is not, as petitioners contend (Pet. 35-37), inconsistent with Congress' rejection of the proposal to accord statutory protection to supervisors so long as they confined their concerted activity to unions restricted to themselves. Congress rejected that proposal because it concluded that the risk of divided loyalty was as great when supervisors joined a union composed exclusively of supervisors as when they joined a union which also represented rank-and-file employees (Pet. 36); therefore, the employer could insist that his supervisors not join even a union composed solely of supervisors. Congress was not addressing itself to the issue here—*i.e.*, whether, assuming the employer were willing to

chose not only to belong to a statutory labor organization,[15] but to exploit the affiliation of their union with another statutory labor organization, the ILA, with the result that the *Floridian's* loading and unloading operations were shut down for a considerable period (*supra*, pp. 7-8).[16]

3. Contrary to petitioners' contention (Pet. 16-19), the issue here is not closely related to that presented in *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, and *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641*, Nos. 73-795 and 73-556, certiorari granted, January 21, 1974.[17] The question in the

---

permit its supervisors to join a rank-and-file union, that union would be subject to the restrictions of Section 8(b) when acting on behalf of the supervisors.

[15] Petitioners concede that Masters, Mates and Pilots is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. 152(5) (Pet. 11, n. 2).

[16] *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Ass'n*, 382 U.S. 181, is not to the contrary. Although the Court there held that state court jurisdiction to enjoin the picketing was not arguably prohibited by Section 8(b), the Court had no occasion to focus on the applicability of Section 8(b)(1)(B). For, as the court below noted (Pet. 10a, n. 3), in "*Hanna* the picketing was not directed at having certain engineers fired and replaced, as was the case here, but rather at having [Marine Engineers] recognized as the bargaining representative of then employed engineers, a majority of whom allegedly desired [Marine Engineers] as their representative."

[17] Significantly, Judges Wright and MacKinnon, who, respectively, wrote the majority and dissenting opinions in those cases, formed the majority in the present case.

latter cases is whether Section 8(b)(1)(B) of the Act proscribes union discipline of supervisor-members for performing rank-and-file work during an economic strike. The resolution of that question depends on (1) whether Section 8(b)(1)(B) reaches not only direct union pressure on the employer to change the identity of the representative he has selected for grievance adjustment or collective bargaining purposes, but also indirect pressure which is likely to affect the loyalty of that representative in the performance of his supervisory or management functions; and on (2) whether the performance by a supervisor of rank-and-file work during a strike is a supervisory or management function. In the present case, the union's pressure was direct, and there is no question that, if successful, it would have required the employer to change the identity of representatives he had selected for grievance adjustment purposes.[18]

---

[18] Although the Trial Examiner in the present case cited the Board's decision in *Electrical Workers, supra* (Pet. App. 28a-29a), it was only in answer to the contention that Section 8(b)(1)(B) did not reach Masters, Mates and Pilots' conduct because it " 'did not stem from any grievance adjusting activity on the part of the *Floridian's* officers.' "

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ELINOR HADLEY STILLMAN
Attorney,
National Labor Relations Board.

APRIL 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 535727 212